IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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SUPREME COURT, U.S.

NO. 79-6443

JOSEPH PROFIT

Appellant

-vs-

CITY OF NIAGARA FALLS, NEW YORK
SECRETARY OF TREASURY OF THE UNITED STATES OF AMERICA
DIRECTOR OF THE OFFICE OF REVENUE SHARING
CITY MANAGER (CHIEF EXECUTIVE), CITY OF NIAGARA FALLS, NEW YORK
MAYOR, CITY OF NIAGARA FALLS, NEW YORK
MEMBERS OF THE CITY COUNCIL OF THE CITY OF NIAGARA FALLS, NEW YORK
HON. HUGH L. CAREY, GOVERNOR OF THE STATE OF NEW YORK
HON. JOHN J. LA FALCE, MEMBER OF CONGRESS

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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BUFFALO, N.Y.

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INTRODUCTORY PARAGRAPH

Joseph Profit, a Black male citizen of the United States, hereby appeals from the final judgment of the United States Court of Appeals for the Second Circuit dated October 1, 1979, holding that "the opinion below of the Honorable John T. Curtin, Civ-78-656(W.D.N.Y. March 20, 1979) is affirmed" and further stating that "as to that portion of the complaint alleging violations of 42 USC Sec. 2000e et. seq., Plaintiff has failed to exhaust his administrative remedies with the Equal Employment Opportunity Commission or with the New York State Division of Human Rights". It should be noted that nowhere in the plaintiff-appellant's complaint dated October 1, 1978, did the plaintiff-appellant cite such section as 42 USC 20000e et.seq. Furthermore, even if the plaintiff-appellant had proceeded on the basis of 42 USC Section 2000e et. seq., as a matter of law he would have prevailed by virtue of the fact that in James v Ogilive (1970, D.C. 111) 310 F. Supp. it states, "Procedural requirements including exhaustion of administrative remedies applicable under the Equal Employment Opportunity provisions of 42 USCS Sec. 2000e et seq. do not apply to proceedings instituted under 42 USCS Sec. 1983". In addition thereto, the opinion of the United States Court of Appeals for theSecond Circuit also refers to 42 USC Section 2000e-5 (c) in the plaintiff-appellant's complaint as an additional basis for their decision and, indeed,there is no part in the complaint whatsoever where such section is quoted. In like manner, there is nothing whatsoever that can be found in that particular section that would negate the fact that the plaintiff-appellant, having been awarded rights and privileges by the Director of the Office of Revenue Sharing on November 30, 1977, those rights and privileges being the crux of this entire action, said plaintiff-appellant had no reason to resort to administrative remedies by virtue of the fact that he had already prevailed in the aforementioned decision of the Director of the Office of Revenue Sharing dated November 30, 1977. Indeed, the resort to such administrative

remedies should have been undertaken by the defendant-respondent, the City of Niagara Falls, New York and, most assuredly, the Honorable John T. Curtin, Judge of the United States District Court for the Western District of New York, erred when he did not so find.

The plaintiff-appellant is of the opinion that this is a case of the first impression dealing with the rights and privileges that inure to a citizen of the United States under the State and Local Fiscal Assistance Act of 1972 as amended, which governs the expenditure of the revenue sharing funds and the anti-recession funds. Therefore, it is the opinion of the plaintiff-appellant that it is indeed essential that a good deal more law must be set forth in this introductory paragraph than is ordinarily expected in such a presentation. See United States v Smuda 423 F. 2d 757, Ca 3rd 1970); Leedon v. Kyne 358 U.S. 184, 3 L. Ed. 2d 210, 79 S.Ct. 180; Federal Crop Ins. Co. v Merrill 332 U.S. 580, 384-85; 68 S.Ct. 192, L. Ed 10 (1948) and Mobil Oil Co. v F.P. C. 417 US 283, 292.

OPINIONS BELOW

The opinion of the Honorable John T. Curtin, Judge of the United States District Court for the Western District of New York, which appears in the Appendix A, is unreported.

The decision of the United States Court of Appeals for the Second Circuit dated October 1, 1979, which appears in the Appendix herein as "B" was also unreported.

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JURISDICTION

A judgement upholding the decision of the United States District Court for the Western District of New York was entered by the United States Court of Appeals for the Second Circuit on October 1, 1979, (Appendix B).

On November 29, 1979, the plaintiff-appellant, Joseph Profit, filed a notice of appeal, (Appendix C), in the United States Court of Appeals for the Second Circuit and he is now submitting this jruisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal herein by virtue of the fact that this case involves the constitutional application of the Revenue Sharing Act as promulgated by the congress of the United States(P.L. 92-512) in 1972 as amended. It further involves plaintiff-appellant's right to due process of law pursuant to the Fifth and Fourteenth Amendments and any other amendments that may be applicable to the United States constitution which, in their application have been sonctrued by the Courts below in such a way that they have prevented the plaintiff-appellant from receiving an award from the Director of the Office of Revenue Sharing which included not only job restoration but also back pay with interest to August 16, 1974, the date of his forced resignation(Appendix D).

Additionally, the jurisdiction of this Court is invoked pursuant to 28 U.S.C 2101 (c), the State and Local Fiscal Assistance Act of 1972 (P.L. 92-512); 31 U.S.C. sections 1221-65 (as amended in 1976 (Act) under 42 U.S.C. sections 1981, 1983, 1985; 42 U.S.C. section 2000d-1, 2000d-2, 2000d-3, 2000d-5, 2000d-6, Title VII of the Civil Rights Act, 31 U.S.C. section 1244 and Pub. L. 82-8552(as amended) and 42 U.S.C section 1988(1970).

This appeal is being docketed in this Court in a timely fashion. An extension of time has been granted by Mr. Justice Marshall by an order dated December 20, 1979 extending the time to and including February 28, 1980.

QUESTIONS PRESENTED

1. Do not the rules and regulations of the State and Local Fiscal Assistance Act (P.L. 92-512) (1972 as amended), which govern the operations of the Office of Revenue Sharing, supersede all the local and state laws in conflict therewith, being that the receipt of such funds is voluntary.

2. Did not the Judge for the United States District Court for the Western District of New York and the United States Court of Appeals for the Second Circuit err in basing their collective rejection of the plaintiff-appellant's claim on alleged statues that do not appear in the complaint of said plaintiff-appellant.

3. Did not the United States Court of Appeals for the Second Circuit err in rendering an adverse decision in plaintiff-appellant's appeal without addressing the constitutional questions presented by said plaintiff-appellant.

4. Was plaintiff-appellant deprived of due process of law by the aciton of the Honorable John T. Curtin, Judge of the United States District Court for the Western District of New York in arbitrarily instructing one of the defendants herein, namely, the City of Niagara Falls, New York, that it need not appear at a proceeding wherein the plaintiff-appellant was seeking a summary judgement and then further refusing to allow any of the remaining parties to address the court. In like manner, did not the court also err in refusing to grant plaintiff-appellant's motion for Summary Judgement against defendant, City of Niagara Falls, New York when said defendant did not file an affidavit in objection thereto, (Appendix E).

5. Was not the plaintiff-appellant deprived of his constitutional right of due process by the Director of the Office of Revenue Sharing's reversal of her decision of November 30, 1977, which gave the plaintiff-appellant certain rights, privileges and money, said reversal taking place almost one year later, without giving the plaintiff-appellant a notice and an orrportunity to be heard as is mandated in Garfield v United States (1908 211 U.S. 249(

6. Are the Defendants, the Hon. John LaFalce, member of Congress, and the

Hon. Hugh L. Carey, Governor of the State of New York, to be held as Defendants in this action pursuant to Kinsella v United States (1900) 361 U.S. 234, 4 L. Ed. 2d, 268, 80 S. Ct. 297; Wolff v McDonnell (1974) 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963, 71 Ohio Ops. 2d 336.

CONSTITUTIONAL PROVISIONS AND RULES

AMENDMENT I

Section 3. Guarantee the right of a citizen "to petition the Government for redress of grievances".

AMENDMENT V

Section 4. No citizen shall "be deprived of life, liberty or property without due process of law".

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 USC 2000d - 1

This subchapter has as one of its objectives the withholding of Federal funds from state supported programs in which there is discrimination based on race or color. Lee v Macon County Board of Education D.C. Ala. 1967, 270 F. Supp. 859.

42 USC 2000d- 1

Federal Courts must cooperate with Congress and executive in enforcing provisions of section 2000d-1 of this Title requiring Federal agencies in administrating any grant in aid programs to see that there is no racial discrimination by any school or other recipient of Federal financial aid. U.S. v Jefferson County Board of Education. C.A. Ala. & Ca 1966, 3/2 863, decree corrected 380 F 2d 385; cetiorari denied 88 S. Ct. 77, 389 U.S. 840, 19 L. Ed. 2d 104.

42 USC Section 2000d-3

Section 2000d of this title, prohibiting discrimination in federally assisted programs does not prempt or limit authority of federal officials to file civil actions designed to reduce or eliminate racial discrimination even though this section provides that this subchapter is not be applicable to employment practices of recipients of federal assistance is to provide employment or where discrimination in employment cause discrimination to the beneficiaries. U.S. by Mitchell v Frazier. D.C. Ala 1970, 317 F. Supp. 1079 supplemental 340 F. Supp./03, see also U.S. by Clark v Frasier D.C. Ala. 1968 267 F. Supp.319.

42 USC Section 2000d-4

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract or insurance or graranty.

42 USC Section 2000d-5

By an Act of September 30, 1950)public Law 874, Eighty first congress) by the Act of September 30, 1950 (Publice Law 815, Eighty First Congress) or by the Cooperative Research Act on the basis of alleged noncompliance with the provisions of this subchapter.

42 USC Section 2000d-6

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by Title VI of the civil Rights Act of 1964.

42 USC Section 1981

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts and to sue, be parties and give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pain, penalties, taxes, licenses and exactions to every kind and no other.

42 USC Section 1983

Every person who under the color of any statute, ordinance, regulation,

custon or usage of any state or Territory subjects or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at lawsuit in equity or other proper proceeding for redress.

42 USC Section 1985

If two or more persons in any State or Territory comspire to prevent by force, intimadation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States....or to injure him in hi person or property on account of his lawful discharge of the duties of his office or while engaged in the lawful discharge thereof or to injure his property so as to molest, interrupt, hinder or impair him in the discharge of his official duties.

28 USCA Section 1331

The District Court shall have original jurisdiction of all Civil Actions wherein the matter in contraversy exceeds the sum of value of ten thousand dollars exclusive of interest and costs and arises under the constitution, laws or treaties of the United States.

28 USCA Section 1343

CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

1. To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

2. To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

3. To redress a deprivation under color of any State Law, statute, ordinance, regulations, custom or usage of any right, privilege or immunity secured by the constitution of the United States or by any act of Congress providing for the equal rights of citizens of all persons within the jurisdiction of the United States.

4. To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil Rights.

TITLE VII OF CIVIL RIGHTS ACT
31 USC Section 1244

A. Whenever a State government or a unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this chapter, upon exhaustion of administrative remedies, a civil rights action may be instituted by the person aggrieved in an appropriate United States District Court or in a State Court of general jurisdiction.

B. The Court may grant relief to the plaintiff any temporary restraining order, preliminary injunction or other order, including the suspension, termination or repayment of funds, or placing any further payments under this chapter in in escrow pending the outcome of the litigations.

42 USC Section 1988 (1970)

The jurisdiction in civil and criminal matters conferred on the District Court by the provisions of this Title and of the Title "Civil Rights and of the Title "CRIMES" for the protection of all persons in the United States in their Civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect.

31 USC Sections 1242 to 1265

State and Local Fiscal Assistance Act of 1972 (P.L. 92-512) as amended in 1976.

RAISING THE FEDERAL QUESTIONS

At the earliest stage of this proceeding below, the plaintiff-appellant raised the constitutional questions as to whether or not the reversal of the November 30, 1979 order of the Director of the office of Revenue Sharing without notice and a hearing to the plaintiff-appellant was violative of the plaintiff-appellant's due process rights under the Fourteenth Amendments to the United States constitution and also contrary to the findings of the United States Supreme court in Garfield v United States (1908) 211 U.S. 249 and Kinsella v United States (1900) 361 US 234, 4 L. Ed. 268 80 S. Ct. 297 and finally contrary to the provisions of the State and Local Fiscal Assistance Act of 1972 (as amended). Furthermore, in like manner, and also at a very early stage, the complainant-appellant raised the federal question as to whether or not the rules and regulations of the Office of Revenue Sharing, embodied in the Local Fiscal Assistance Act (P.L. 92-512 1972 as amended) supercede all State and local laws and charter provisions in conflict therewith by virtue of the fact that the receipt of such funds is strictly voluntary. Furthermore, the complainant-appellant raised the Federal question as to whether or not his constitutional rights were violated by the actions of the United States Court of Appeals for the Second Circuit in that they base their decision on the obviously false assumption that the plaintiff-appellant had not exhausted his administrative remedies, a conclusion that is contrary to the decisions in Leedon v Kyne U.S. 184, 3 L. Ed 2d, 210, 79 S. Ct. 150. Finally, the plaintiff-appellant raised the Federal question as to whether or not defendants were in default as to plaintiff's Motion for a Summary Judgement as a matter of law.

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STATEMENT OF THE CASE

Plaintiff, Joseph Profit, a Black male citizen of the United States was employed by the defendant, City of Niagara Falls, New York for a period of approximately eight years as an Inspector in the Engineering Department; a Foreman in the Streets Division; a Deputy Director of Public Works and, finally, by virtue of his efficient and excellent service to the municipality, he was appointed the Director of Public Works on September 1, 1970. Subsequently, on August 16, 1974, he was compelled to resign his position by virtue of the illegal action of the City Manager of the City of Niagara Falls who was seeking to demote him to the position of Deputy Director of Public Works. This attempt at demotion was based upon the untrue and baseless assertion that the holder of the position of Director of Publkc Works not only needed to be but was required to be a licensed engineer. Furthermore, despite the clear language of the law, as set forth in Section 122 (A) of the State and Local Fiscal Assistance Act 31 U.S.C. Section 1242 (a), the City Manager insisted that he had the right to demote the appellant to the position of Deputy Director of Public Works without cause other than that which has been previously cited. Moreover, it should be noted that the gentleman who succeeded the plaintiff-appellant for a short period of time was a white engineer but, almost immediately thereafter, the next appointment to the position of Director of Public Works was a white gentlemean who did not have a degree in engineering nor was he so licensed. In fact, as of this date, the gentleman holding said position is white, not a licensed engineer and, indeed, is not as qualified as the plaintiff-appellant herein, nor is he as knowledgeable in this particular field as the plaintiff-appellant herein.

Particular attention should be given to the fact that after the plaintiff-

appellant was forced to resign, the Defendant, City of Niagara Falls, New York, quietly ceased even attempting to maintain the charade that it was mandatory or necessary for the Director of Public Works to be an engineer but instead satisfied itself with the vague language that the holder of the position of Director of Public Works needed only to possess knowledge which would be equivalent of an engineer, whatever that term might mean. In fact, it is akin to saying that the status quo should prevail.

Following his illegal termination from the aforementioned position, the plaintiff-appellant began to personally acquaint all the City officials, who were in major positions of authority, with the extent of the injustice which he felt he had suffered on account of his race. However, he was met with such a degree of non cooperation and outright hostility that not only was his grievance ignored but also he found himself unable to obtain any kind of worthwhile employment in the City of Niagara Falls, New York or, indeed, in the entire Western New York area. In like manner, plaintiff-appellant was unable to find any lawyer in the area who would accept his case. In addition to the foregoing facts, the plaintiff-appellant had suffered an accident on October 14, 1966, while employed by the City of Niagara Falls, New York, as a foreman, which resulted in a decision giving him thirty three and one third percent disability. Therefore, under Section 504 of the Rehabilitation Act the plaintiff-appellant's rights were violated by the illegal discrimination and subsequent forced resignation that resulted in this action.

Eventually, the plaintiff-appellant was able to enlist the aid and assistance of the Office of the Director of Revenue Sharing who finally sent in representatives who conducted two investigations in this matter, one investigation was launched under Secretary of Treasury William Simon who sent in Miss Marie Davis, and the other investigation was conducted under the Secretary of Treasury Michael Blumen-

thal who sent in another investigator. In fact, the lengh of time encompassed by the total investigations was six hundred and fifty (650) days. Eventually, as a result of these investigations, the Director of the Office of Revenue Sharing, Bernadine Denning, issued a finding of non-compliance against the Defendant, City of Niagara Falls, New York on November 30, 1977 and ordered that the plaintiff-appellant be reinstated with back pay, among other things. A copy of said finding and order is made a part of the appendix herein. Due to the importance of those rights and privileges, which the plaintiff-appellant was granted, it is deemed necessary by the plaintiff-appellant that they be setforth as well at this point. It should be noted, however, that insofar as the plaintiff-appellant is concerned, that whenever the aforementioned order refers to the word "request" or "requested", the Director is issuing a mandate by virtue of the fact that said plaintiff-appellant believes that when one who "requests" has the power to enforce by statute, such "request" has the force of law and is really a mandate. The section to which the plaintiff-appellant herewith refers reads as follows:

> As a result of the findings of noncompliance cited above, I am sending this letter as required by Section 122 (b) of the Act and Section 51.59 of the Regulations. A copy of this letter is also being sent to Governor Hugh L. Carey.
>
> It is therefore requested that the City of Niagara Falls,New York:
>
> 1. Rehire the complainant, Joseph Profit, into a position comparable to the job of Director of Public Works and at the rate of pay he would be receiving had he not been removed from the Director's position. Restore the seniority lost between the time of the termination and reinstatement. Provide for the reinstatement of the Complainant to Director of Public Works when the position becomes vacant. Provide full back-pay to the Complainan- to include any salary increases he would have received since August 16, 1974 to the present plus six percent annual interest on the base salary. The back-pay award should subtract, upon proof provided by the Complainant, all earnings he received during the time since August 16, 1974.
>
> Agree to make those contributions that would normally have been made to the Complainant's insurance and pension plans and restore to the Complainant any other fringe

benefits which would have accrued had the Complainant not terminated the position.

Provide to the Office of Revenue Sharing documentation showing how the back-pay award was computed. Also provide a description of the position into which the Complainant will be rehired and the date of rehire.

Despite the clear language of the findings of non compliance and the order of the Director of the Office of Revenue Sharing, Bernadine Denning, dated November 30, 1977, the officials of the City of Niagara Falls, New York regarded the "request" or mandate with dreision and scorn. In fact, Governor George Wallace in his heyday, when he was standing in the doorway of the University of Alabama to keep out Black citizens, was never more defiant of a governmental finding and order. In like manner, officials of the City of Niagara Falls, New York stated in the press that they would resist compliance and defy the government.

In such an atmosphere of hostility the City of Niagara Falls, New York not only remained in non compliance but also did not inform the government of their position until the sixty day time limit had practically expired. Subsequently, the Director of the Office of Revenue Sharing chose to ignore Section 51.65 of the Regulations Governing the Payment of Entitlements under Title 1 under the State and Local Fiscal Assistance Act of 1972 entitled Procedure for Effecting Compliance which compelled her to either send the matter to the administrative law judge, refer same to the Attorney General of the United States or invoke whatever other sanctions as provided by law, which, as the law makes clear, includes the Secretary withholding revenue sharing funds from the offending municipality. Furthermore, between the time of the finding of non compliance and the municipality's non conforming to the edict or order, it was the duty of the Governor of the State of New York, the Hon. Hugh Carey, to require compliance. In any event, the dilatory and obstructive tactics of the Defendant, City of Niagara Falls, New York, aided and abetted by the Director of the Office of Revenue Sharing, continued unabated until

finally on October 10, 1978 the plaintiff-appellant brought an action in the United States District Court fot the Western District of New York in which an injunction and/or a temporary restraining order as well as a declaratory judgment was sought against the defendants herein whereby not only the revenue sharing and anti-receission funds of the City of Niagara Falls would be withheld but also compelling them to return the revenue sharing funds that they had received since the Director's determination of noncompliance on November 30, 1977 or, in the alternative, to comply with the said order.

At the time of the first hearing before the Hon. John T. Curtin, Judge of the United States District Court for the Western District of New York, on the 13th day of October, 1978, the Assistant United States Attorney, Rosemary Roberts, informed the Court that she had just received information that the Director of the Office of Revenue Sharing had reversed her order of November 30, 1977 the day previously and that the Court and the plaintiff-appellant would receive a copy of said order within ten days or so. Furthermore, when a copy of the aforementioned reversal was finally received, it was quite shocking to discover that said reversal was based on alleged information that the Defendant, City of Niagara Falls, New York, had submitted to the Director of the Office of Revenue Sharing on the 2nd of October, 1978, almost a year after the original order. It should also be noted that, as of this date, the plaintiff-appellant has not received a copy of the alleged additional information on which this illegal reversal was based.

During the proceedings before the Hon. John T. Curtin, the Court continually erred not only in questioning its jurisdiction, which it was finally forced to resolve in favor of the plaintiff-appellant but also it erred in ignoring the findings in the United States of America, et al. v the City of Chicago 411 F. Supp. 218 (1976); 416 F. Supp. 788 (1976; 420 F. Supp. 733 (1976), which was heard before the United States Court of Appeals for the Seventh Circuit, and which was decided

on January 11, 1977 wherein the City of Chicago was found to be in non compliance of an order of the Director of the Office of Revenue Sharing and, therefore, was in violation of the provisions of the Local and State Fiscal Assistance Act of 1972 as amended, which resulted in the revenue sharing funds being withheld from the City of Chicago until said municipality came into compliance. The Court further erred by ignoring the fact that the availability of general Federal question jurisdiction for constitutional deprivation against municipal corporations has been recognized by the Supreme Court. USCA Const. Amends 1.514, 28 USCA Section 1331, 1343, 1343 (3), 42 USCA Section 1981, 1983. In fact, the record is replete with the omissions and errors of the District Court as well as the fact that the United States Court of Appeals for the Second Circuit completely ignored the constitutional questions that were posed by the plaintiff-appellant in this action. The plaintiff-appellant further respectfully requests that the Supreme Court of the United States accept this appeal on the further ground that both the United States District Court for the Western District of New York and the United States Court of Appeals for the Second Circuit erred in failing to apply prior Supreme Court decisions because of error or oversigh- as set forth in S.E.C. v Otis & Co. 338 U.S. 843; F.C.C. v Broadcasting Service Organization, Inc. 337 U.S. 901.

THE QUESTION IS SUBSTANTIAL

The question is substantial by virtue of the fact that it is one as to the applicability of the Local and State Fiscal Assistance Act of 1972 (P.L. 512 (1972), Sec. 5153 as passed by the Congress of the United States and subsequently amended in 1976, which states that "in any program or activity funded in whole or in part with entitlement funds a recipient government may not (directly or indirectly through contractural or other arrangements) subject any individual to discrimination on the ground of race, color, national origin, or sex in its employment practices. These practices include recruitment, hiring, advertising, layoff, termination, upgrading, demotion (emphasis mine), transfer, rates of pay" etc... It has not been treated before by this court. In line with this substantial question is one involving the responsibilities of the officials of State and Local governments to adhere to the rules and regulations of the aforementioned Local and State Fiscal Assistance Act of 1972 (P.L. 512 (1972) as passed by Congress and subsequently amended in 1976 or, in the alternative, be found to be in non compliance with the resultant loss of such funds. Not only has this issue also not been treated before by this Court but also there is a distinct conflict between the decision of the United States Court of Appeals for the Seventh Circuit in the case of the United States of America, et al. v the City of Chicago 411 F. Supp. 218 (1976); 416 F. Supp. 788 (1976; 420 F. Supp. 733 (1976) and the decision in the instant case that was heard before the United States Court of Appeals for the Second Circuit. Indeed, the disparity between the two decisions augurs ill for the orderly interpretation of a law that effects every State and locality in the United States and the plaintiff-appellant specifically refers to "intracircuit conflict" as relates to a "recurring and important issue or is accompanied by a widespread conflict among the circuits" which was the basis for review by the Supreme Court of the United States as setforth in Commissioner v.

Estate of Bosch, 387 U.S. 456, 457 and the decision in John Hancock Ins. Co. v. Bartels 308 U. S. 180, 181, which refers to "intracircuit conflict" being one of the factors inducing the Supreme Court of the United States to grant a review and, finally, the decision of Dickinson v. Petroleum Conversion Corp. 388 U.S. 507, 508 wherein a review was granted because of "intracircuit conflict and the importance of the question."

In the instant case, the Federal Court not only tended to question its own jurisdiction but also refused to enjoin the Defendant, City of Niagara Falls, from receiving revenue sharing funds even though they were found to be in non compliance with the aforementioned law. In fact, the same rationale that the Director of the Office of Revenue Sharing used to compel the City of Chicago to come into compliance in the matter of the United States of America, et al. vs City of Chicago (supra) was used against the plaintiff-appellant herein to deny him his constitutional rights and this violation of the plaintiff-appellant's rights has occurred both in the Federal Court and the United States Court of Appeals for the Second Circuit. Indeed, an example of this dichotomy is to be found in the Chicago case wherein "in reliance on Judge Marshall's findings the Court on December 18, 1974 enjoined further payment of revenue sharing funds to the City until such time as the Secretary and the Office of Revenue Sharing determined that the police department was in compliance with the non discrimination provision of the Fiscal Assistance Act." However, in the instant case, as well as in the other spheres in which the Cityof Niagara Falls was found to be in non compliance, no attempt was made to enjoin the payment of such revenue sharing funds nor was there any serious attempt to compel compliance with the rules and regulations of the Local and State Fiscal Assistance Act of 1972 (P.L. 92-512) (1972) and subsequently amended in 1976. Indeed, it is quite amazing that we find not only the Director of the Office of Revenue Sharing, the Attorney General of the United States and the related arms of the Federal Government all in opposition

to the plaintiff-appellant's attempt to prevail in this matter. In fact, the inconsistency is so great that the plaintiff-appellant can only look to this Court for the correction of such a gross injustice.

The substantialness of the question is buttressed by the decision in Garfield v United States (1908 211 U.S. 249) that states that "one who has acquired rights by administrative or judicial proceedings cannot be deprived of them without notice and an opportunity to be heard for right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of essence of due process". In this connection, we find that both the District Court and the United States Court of Appeals for the Second Circuit have completely ignored or overlooked this basic determination by the Supreme Court of the United States and, therefore, the plaintiff-appellant respectfully contends that he has been deprived of his constitutional rights.

CONCLUSION

Plaintiff-appellant is of the opinion that it is essential that the Court address itself to the fact that the decision of the United States Court of Appeals for the Second Circuit in the instance case reflects a confused area of law productive of different judicial responses and, therefore, should be resolved by the United States Supreme Court. (See Shapiro v United States 335 U.S. 14). Indeed, it is the contention of the plaintiff-appellant that a judicial resolution is of the greatest importance at this time.

.....

.....

February, 1980

Respectfully submitted,

ARTHUR SAYRES ANDERSON, SR., ESQ.
Attorney for plaintiff-appellant
1724 Statler Building
Buffalo, New York 14202
(716) 856-3811

APPENDIX

RECEIVED
MAR 20 1979
UNITED STATES ATTORNEY

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JOSEPH PROFIT

Plaintiff,

-vs- Civ-78-65

CITY OF NIAGARA FALLS, NEW YORK, et al.

Defendants.

DECISION
and
ORDER

CURTIN, DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSEPH PROFIT

Plaintiff,

-vs- Civ-78-656

CITY OF NIAGARA FALLS, NEW YORK
SECRETARY OF TREASURY OF THE UNITED STATES OF AMERICA
DIRECTOR OF OFFICE OF REVENUE SHARING
CITY MANAGER (CHIEF EXECUTIVE), CITY OF NIAGARA FALLS, NEW YORK
MAYOR, CITY OF NIAGARA FALLS, NEW YORK
MEMBERS OF THE CITY COUNCIL OF THE CITY OF NIAGARA FALLS, NEW YORK
HON. HUGH L. CAREY, GOVERNOR OF THE STATE OF NEW YORK
HON. JOHN J. LA FALCE, MEMBER OF CONGRESS

Defendants.

APPEARANCES: ARTHUR S. ANDERSON, SR., ESQ., Buffalo, New York, for Plaintiff.

BERNARD SAX, ESQ., Deputy Corporation Counsel, Niagara Falls, New York, for Defendant City of Niagara Falls and individual City Defendants.

RICHARD J. ARCARA, ESQ., United States Attorney (MS. ROSEMARY G. ROBERTS, of Counsel), Buffalo, New York, for Defendants Secretary of Treasury and Director of Office of Revenue Sharing.

ROBERT ABRAMS, ESQ., Attorney General of the State of New York (JAMES L. KENNEDY, ESQ., of Counsel), Buffalo, New York, for Defendant Governor Hugh L. Carey.

Joseph Profit filed this action against the City of Niagara Falls, the City Manager, the Common Council, and the Mayor of Niagara Falls, the Secretary of the Treasury ["Secretary"], the Director of the Office of Revenue Sharing, the Governor of the State of New York, and John J. LaFalce, a member of the United States House of Representatives. 1/ The plaintiff seeks a declaratory judgment that the defendants' actions have violated the plaintiff's rights under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§1221-63 (as amended in 1976) ["Act"]; under 42 U.S.C. §§1981, 1983, and 1985; under the due process clause of the fourteenth amendment to the United States Constitution; and, under Title VII of the Civil Rights Act, 42 U.S.C. §§2000e et seq. The plaintiff also seeks permanent injunctive relief restraining the defendant City of Niagara Falls from applying for, receiving or otherwise using funds provided by the Act and directing repayment of funds already received. 2/ In addition, the plaintiff seeks a money judgment from the City of Niagara Falls in the form of compensatory damages for mental distress and for back pay and a money judgment from all of the defendants "to make whole the plaintiff" and for the loss of his credit standing and employment opportunities.

Finally, the plaintiff seeks an order directing the City to rehire him.

The plaintiff alleges that he was discriminated against in violation of the Act when he was terminated from his position as Director for the Department of Public Works for the City of Niagara Falls. This was on or about August 16, 1974. He claims that he was compelled to resign through a change in the job requirements for the position of Director of Public Works to include an engineering license.[3/] The plaintiff filed an administrative complaint with the Secretary and with the Office of Revenue Sharing ["ORS"] on February 16, 1976. On November 30, 1977, the Director of the ORS issued a determination that the City of Niagara Falls had discriminated against the plaintiff and that it was in violation of the nondiscrimination provisions of the Act.

In a letter dated January 27, 1978, the City of Niagara Falls objected to this determination. It supplied the ORS with additional information relating to the plaintiff and his employment position. The ORS requested additional information from the city on March 23, 1978.

The plaintiff filed this action on October 10, 1978. On October 27, 1978, the Director of the ORS issued

a second determination with respect to the City of Niagara Falls. This determination included a finding that there was no evidence that Mr. Profit had been discriminated against on the basis of his race.[4/]

The case is before the court now on a number of motions made by the various parties. First, there are motions to dismiss plaintiff's complaint presented by all of the remaining defendants. Second, the plaintiff has made a motion for summary judgment. Third, the plaintiff has made several other motions. He has made motions: (1) to have the Director of the ORS and/or the Assistant United States Attorney, Rosemary G. Roberts, held in contempt of court; (2) to strike the affidavits of Ms. Roberts, one dated October 26, 1978 and one dated November 22, 1978; (3) to strike the affidavit of James L. Kennedy, attorney for defendant Hugh L. Carey, Governor of the State of New York; (4) to strike the affidavit of Donald J. O'Hara, City Manager of the City of Niagara Falls; and (5) to strike the determination notice issued by the Director of the ORS on October 27, 1978.[5/]

I. MOTIONS TO STRIKE AFFIDAVITS AND TO HOLD DEFENDANTS IN CONTEMPT

The motions to strike the affidavits of Ms. Roberts, Mr. Kennedy, and Mr. O'Hara are denied. The plaintiff claims in his motions that their affidavits are without merit, immaterial and "not legally responsive." Apart from the single motion directed at the November 22, 1978 affidavit of Ms. Roberts, alleging that her affidavit was filed late, his papers consist wholly of legal arguments directed at the merits of the case as a whole. The lateness objected to consisted of two days which was not unreasonable under the circumstances. The plaintiff has shown the court no case law nor presented any facts which would lead it to direct the extraordinary relief requested in this motion.

Moreover, the plaintiff's motion to hold the Director of the ORS and/or Ms. Roberts in contempt of court is equally without merit. The plaintiff argued that either or both of these defendants deliberately attempted to mislead the court with respect to communications received by the court about the ORS determination letter of October 27, 1978. A review of the letters in question and of Ms. Roberts' affidavit, dated November 27, 1978 (Item No. 26, Court File), which adequately

explains the alleged discrepancies to which the plaintiff pointed, convinces the court that there has been no misleading of the court and that none was intended.

II. DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S ACTION

Although not raised by the defendants nor clearly presented by the plaintiff, the court must consider whether it has jurisdiction over plaintiff's claims. The plaintiff places principal reliance on the State and Local Fiscal Assistance Act of 1972 and the amendments to the Act in 1976. 31 U.S.C. §§1221-65. This Act prohibits discrimination on the basis of race by any government receiving revenue sharing funds. 31 U.S.C. §1242 (1976).[6/] As amended in 1976, the Act also provides for private civil actions whenever a "unit of local government . . . has engaged or is engaging in any act or practice prohibited by this chapter, upon exhaustion of administrative remedies . . .." 31 U.S.C. §1244(a) (1976). This section is applicable only as to revenue sharing entitlement periods beginning on or after January 1, 1977. See State and Local Fiscal Assistance Act Amendments of 1976, §13(a), Pub.L. 94-488, 90 Stat. 2353.

Prior to the amendment of the Act, it did not contain such an explicit remedy for private individuals seeking to enforce compliance with the nondiscrimination section of the Act. Enforcement of this section was left generally to the Secretary and to the Attorney General. Jurisdiction over suits by private individuals, however, has been invoked in some instances under 28 U.S.C. §§1343(3) and (4), 2201 and 2202, among other provisions. See Robinson v. Simon and United States v. City of Chicago, 395 F.Supp. 329, 334, n.5 (N.D.Ill. 1975); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); Johnson v. City of Arcadia, 450 F.Supp. 1363 (M.D.Fla. 1978). Nonetheless, whether prior to the amendments Congress intended that a district court should withhold revenue sharing funds is unclear. See United States v. City of Chicago, 549 F.2d at 439, n. 37.

The issue of jurisdiction is complicated somewhat because the plaintiff's alleged cause of action in this case arises out of an entitlement period prior to the applicable date of the amendment giving private persons a statutory remedy. The new regulations promulgated by the Secretary provide that in such a situation the regulations issued in

1975 are to apply. 31 C.F.R. §51.0(b) (1977).[7] Under the 1975 regulations, which track the original statute, no private right of action was apparently envisioned. See §§51.57, 51.59, and Subpart G of the 1975 Regulations issued by the Secretary.

Since Congress added 31 U.S.C. §1244 explicitly providing for private civil actions and since the section is applicable only as to entitlement periods beginning on or after January 1, 1977, the court believes that a strong argument exists that the court does not have jurisdiction over claims brought by persons in the position of the plaintiff. His claim arises out of an event which occurred during an entitlement period prior to the effective date of the amendment. The structure of the Act prior to the amendment would indicate that Congress may originally not have intended that a private cause of action exist for its enforcement. See United States v. City of Chicago, 549 F.2d at 439, n.37.

On the other hand, the language of 31 U.S.C. §1244(a) which provides for a civil action whenever a recipient government "has engaged in" a discriminatory practice indicates that the section may apply to past discrim-

inatory acts. Under such a view, the limitation of the section to entitlement periods after January 1, 1977 would be a limitation only as to the scope of relief in appropriate cases. Further support for this view is found in the 1977 regulations which state that for causes of action arising out of entitlement periods prior to January 1, 1977, the 1975 regulations are to apply.

The court notes as well that one other court invoking jurisdiction over an action brought under the pre-amendment Act relied on 42 U.S.C. §1343.[8/] Johnson v. City of Arcadia, supra. There would seem to be some question whether the Act, prior to the amendment adding 31 U.S.C. §1244, "authorized" a person to commence a civil action within the meaning of 28 U.S.C. §1343. Despite my reservations, however, the court will not dismiss this action for lack of subject matter jurisdiction. Under the present Act at least, a court does have jurisdiction over private civil actions and can order the withholding of revenue sharing funds in an appropriate case. 31 U.S.C. §1244(a) and (b). See United States v. City of Chicago, supra, at 439, n. 37.

From the question of jurisdiction, it is necessary to shift to the basis of the plaintiff's claim that

the nondiscrimination provisions of the Act and the regulations have been violated. Closely connected to this issue is the plaintiff's motion to strike the October 27, 1978 notice from the Director of the ORS. This notice communicated the Director's determination that there was no evidence to show that the plaintiff was discriminated against by the City of Niagara Falls and, in effect, reversed the earlier, November 30, 1977 finding that plaintiff had been discriminated against. The November 30, 1977 finding is set forth in the Affidavit of Arthur Anderson, Exhibit 2, dated November 21, 1978. The October 27, 1978 notice from the Director is in the form of a letter to Mr. Mooradian of the City of Niagara Falls, a copy of which was sent to the plaintiff. See Exhibits A and B, Affidavit of Rosemary Roberts, dated November 27, 1978.

The plaintiff argues that this notice should be struck from the record on the grounds that "said letter of reversal has no force or effect at law, that it is facetious, contemptuous of the judicial process, dishonest in its inception; it is a sham and highly prejudicial to the Plaintiff." Affidavit of Arthur S. Anderson, Attorney for Plaintiff, dated November 19, 1978. He essentially contends

that the November 30, 1977 finding of the Director was final and not an initial determination. The "reversal" is said to be illegal and contrary to the Director's duties under the regulations once a finding of noncompliance is found.

The plaintiff's motion to strike the notice of October 27, 1978 necessitates consideration of the applicable regulations which are also at the heart of the defendants' motions to dismiss. The applicable regulations governing plaintiff's claim are those promulgated in 1975, not those issued by the Secretary in 1977. 31 C.F.R. §51.0(b) (1977)(quoted at length in fn. 5). The plaintiff's cause of action arises out of an entitlement period prior to January 1, 1977. Therefore, the 1975 regulations apply.

The 1975 regulations provide a procedure for complaints by private persons; where the Secretary has reason to believe a recipient of funds has discriminated in violation of the Act, the Secretary shall cause a prompt investigation to be made by the ORS, although no time limits are set forth. See §51.57(a) and (b) of the 1975 Regulations. Moreover, whenever the Secretary

determines that there has in fact been a violation, he shall notify the chief executive officer of the recipient government and the governor of the state in which that government is located to request the governor to secure compliance. §51.59(a) of the 1975 Regulations.[9] If the governor fails or refuses to secure compliance, the Secretary may: (1) refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) initiate administrative proceedings; or (3) take any other actions provided for by law. Id.[10] This provision gives discretion to the Secretary and, again, there are no specific time limitations within which actions must be taken.

The federal defendants argue that the Secretary properly acted within his discretion in choosing not to refer the plaintiff's administrative complaint to the Attorney General and not to initiate an administrative hearing. They argue that in choosing to request further information from the City of Niagara Falls and in continuing the investigation of the complaint, the Secretary took "other action as may be provided by law." §51.59 (a)(3) of the 1975 Regulations. In support of this argument, they point to §51.83 of the 1975 Regulations (now

part of Subpart G of the 1977 Regulations, 31 C.F.R. §51.203). That section provides:

> Opportunity for compliance.
>
> Except in proceedings involving willfulness or those in which the public interest requires otherwise, a proceeding under this part will not be instituted until such facts or conduct which may warrant such action have been called to the attention of the chief executive officer of the recipient government in writing and he has been accorded an opportunity to demonstrate or achieve compliance with the requirements of the Act and the regulations of this part. If the recipient government fails to meet the requirements of the Act and regulations within such reasonable time as may be specified by the Director, a proceeding shall be initiated.

After reviewing the statute and the applicable regulations, the plaintiff's motion to strike the second determination of the Director of the ORS, dated October 27, 1978, is denied. The court is convinced that the Secretary was under no affirmative obligation to take any immediate action toward having revenue sharing payments withheld. In fact, by requesting additional information from the City of Niagara Falls, by reviewing information submitted by the City to explain the circumstances surrounding the employment of the plaintiff, (see Exhibit 3

of Mr. Anderson's Affidavit dated November 21, 1978), the Secretary acted within his discretion and gave the recipient government an opportunity to demonstrate its compliance with the regulations. The initial finding that the plaintiff had been discriminated against did not require an immediate administrative hearing or a reference to the Attorney General. The Secretary acted in another way, as provided by law.

Since the defendants filed affidavits in support of their motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, referring to the second notice sent by the Director of the ORS, the motions shall be treated as being for summary judgment under Rule 56.

In resolving these motions, it is important to note again at the outset that the court believes that the procedure which the Secretary and the ORS followed in reviewing the complaint of the plaintiff was proper and authorized by law. The Secretary was not compelled by the Act or the regulations to begin any judicial proceeding based on the November 30, 1977 finding of the Director of the ORS.

Moreover, the plaintiff places primary reliance on this 1977 finding of discrimination by the City of Niagara Falls.[11/] This finding has been reversed by the Director of the ORS and the notice communicating this determination states that there is no evidence that the plaintiff was discriminated against. Although this determination is not conclusive, deference should be shown to such a finding absent contradictory evidence of discrimination. In this case, the plaintiff has failed to support his claim of discrimination with any substantial evidence outside the 1977 finding. Mr. Profit's affidavit merely repeats the 1977 finding and alleges that none of the defendants acted as required by law. See Affidavit of Joseph Profit, dated October 10, 1978. The affidavit of his attorney does claim a change in the requirements for the position held by the plaintiff, which is alleged to be discriminatory. See Affidavit of Arthur S. Anderson, filed November 21, 1978. This change was reviewed by the ORS and, on reconsideration, the Director found no evidence of discrimination. Finally, there is no evidence that this finding was arbitrary or capricious.

There is no issue of fact in this case and the court grants defendants' motions with respect to claims under the State and Local Fiscal Assistance Act. Plaintiff's motion for summary judgment is denied.

III. TITLE VII AND 42 U.S.C. §§1981, 1983 and 1985 CLAIMS

The plaintiff also has based his action under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. 42 U.S.C. §§2000e et seq. Any claim against the Secretary, the Director of the ORS and the Governor of the State of New York intended by the plaintiff must be dismissed for failure to state a claim. None of these defendants employed the plaintiff at any time.

The claim against the City of Niagara Falls and the individual city officials must also be dismissed. There is no evidence that plaintiff filed the requisite administrative charges with the Equal Employment Opportunity Commission or with the New York State Division of Human Rights. 42 U.S.C. §2000e-5(c). Timely filing is a jurisdictional prerequisite to the commencement of a court action under Title VII. Collins v. United Air Line, Inc., 514 F.2d 594, 596 (9th Cir. 1975). Where only a

discrete act of discrimination is alleged, as in this case, no exception to this requirement will be considered by the court.

In addition, the plaintiff has asserted his claim for relief under 42 U.S.C. §§1981, 1983 and 1985. With respect to the §1981 and §1983 claims, they are barred by the statute of limitations. The plaintiff's alleged claim arises out of an employment termination which occurred on or about August 16, 1974. His complaint was filed on October 10, 1978. This is more than three years from the date plaintiff's cause of action accrued, the applicable period of limitations in this situation. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971); N.Y. CPLR §214(2) (McKinney's 1978). Moreover, based upon the reasoning in Johnson, supra, in which an employment discrimination charge had been filed with the EEOC, the court is convinced that the running of the period of limitations should not be tolled when a person files an administrative complaint with the ORS. Therefore, plaintiff's claim against the defendants under 42 U.S.C. §§1981 and 1983 is time-barred.[12/]

With respect to any claim under 42 U.S.C. §1985, it is dismissed for failure to make sufficient factual allegations of a conspiracy. See Weise v. Syracuse University, 522 F.2d 397, 408 (2d Cir. 1975).

The Clerk is directed to enter judgment dismissing the complaint as to all defendants.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: March 20, 1979

FOOTNOTES

1/ For failure to serve Rep. LaFalce with process in this case, the action is dismissed against him.

2/ The plaintiff's motions for a temporary restraining order and for a preliminary injunction were denied by this court on December 6, 1978.

3/ See Affidavit of Arthur S. Anderson, attorney for the plaintiff, dated November 21, 1978.

4/ A somewhat more detailed summary of the relevant documents is included in this note.

(1) Mr. Profit's administrative complaint of February 16, 1976 was in the form of a letter to the then Secretary of the Treasury, William Simon. See Affidavit of Arthur S. Anderson, Exhibit 1, dated November 21, 1978. He alleged in that complaint that he was terminated because of his race through a revision of the charter of the City of Niagara Falls, a revision which mandated the position which he held to require specific job qualifications. He alleged, in addition, discriminatory practices in general by the city and misuse of revenue sharing funds by the city under the Revenue Sharing Act. He asked for an investigation at the earliest possible time.

(2) Representatives of the ORS conducted an investigation of Mr. Profit's allegations. This investigation covered a number of matters in addition to those raised in his complaint. On November 30, 1977, by letter to Donald J. O'Hara, City Manager of Niagara Falls, the Director of the ORS informed the city of the results of the investigation. The director found that the plaintiff had been removed from his position as the Director of Public Works because of discrimination. The director stated

that Mr. Profit's resignation had been prompted by the city's offer of a demotion to Deputy Director because he lacked the new job requirement of an engineering license. This requirement resulted from a recommendation made by a Public Administration Service position description and review. The director stated that the ORS investigation had disclosed no evidence that any department head other than Mr. Profit, the only minority department head, had been similarly displaced. Finally, the director relied on the investigation which showed that

> the previous Director of Public Works and the present director, both white, do not have an engineering license. The white male replacing the complainant and holding the position for approximately 15 months did possess an engineering license.

The court notes as well that this letter ordered the city to rehire Mr. Profit for a job comparable to that of Director of Public Works.

The letter which contained this finding with respect to the plaintiff also included substantial material relating to the overall city employment situation and directions for remedial actions other than the rehiring of the plaintiff.

(3) The City of Niagara Falls objected to this finding by the ORS by letter to Ms. Bernadine Denning, Director of the ORS, dated January 27, 1978. See Affidavit of Arthur S. Anderson, Exhibit 3, dated November 21, 1978. In this letter, the Corporation Counsel for the city, Mr. Carl Mooradian, submitted additional information pertaining both to the plaintiff's allegations and to the remedial actions requested by the ORS. On March 23, 1978, Ms. Denning requested additional material with respect to Mr. Profit's complaint. See Affidavit of Arthur S. Anderson, Exhibit 4, dated November 21, 1978. Exhibits 5, 6, 8, 10, 11, 12, and 13 of this affidavit show the continuing attention given to the

plaintiff's allegations during the early and summer months of 1978 by the ORS, which included consideration of possible legal action against the City of Niagara Falls (see Exhibit 13).

The October 27, 1978 letter or notice from the Director of the ORS, however, stated that there was no evidence that Mr. Profit was discriminated against on the basis of race. The notice states that the ORS reviewed additional data which shows that the City of Niagara Falls undertook a reorganization during which "various departments and positions were absorbed and/or abolished ...." The Director of the ORS stated that the evidence "shows that Mr. Profit was treated in a manner in accordance with a system applied to other similarly situated persons, regardless of their race, sex or ethnic group." Again, the letter contained additional matter relating solely to the city as a whole.

5/ After these motions were submitted for decision, the attorney for the plaintiff moved for default judgments against the defendants. I denied these later motions from the bench on February 15, 1979. See Order dated February 20, 1979.

6/ The section as originally enacted contained a general prohibition against discrimination under any program funded with revenue sharing funds. Pub. L. 82-512, §122(a), 86 Stat. 932 (1972). This section was broadened in 1976 to prohibit discrimination because of age or because of a handicap. Moreover, a more specific procedure was established for determinations by the Secretary that a government was in noncompliance with the Act with time limitations built in. 31 U.S.C. §1242 (1976).

7/ This regulation provides in relevant part:

> Any cause of action arising out of the expenditure of entitlement payments in violation of the prohibitions and restrictions of subparts D, E and F of this part prior to January 1, 1977 shall be covered by regulations in effect on December 31, 1976 and any proceedings commenced thereon shall be governed by the procedures set forth in Subpart G of this part.

8/ 28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

9/ The procedure detailed in §51.59(a) of the 1975 Regulations were, in fact, part of the original statute also. It was embodied in 31 U.S.C. §1242(b) prior to the amendment.

10/ The alternatives authorized by the regulation were also part of the statute prior to the amendment. See 31 U.S.C. §1242(b).

11/ See n. 4, supra, for a summary of this finding.

12/ Although the court does not reach this issue, the plaintiff's damages claim against Governor Carey may have additional problems with respect to the immunity afforded to state officials. See, e.g., Bogard v. Cook, 586 F.2d 399, 410 (5th Cir. 1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974).

United States Court of Appeals

SECOND CIRCUIT

APPENDIX B

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 1st day of October , one thousand nine hundred and seventy-nine.

Present: Hon. William H. Mulligan
Hon. Ellsworth A. Van Graafeiland
Hon. Thomas J. Meskill

UNITED STATES COURT OF APPEALS
FILED
OCT 1 1979
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Circuit Judges.

JOSEPH PROFIT,

Plaintiff-Appellant,

-against-

79-6089

CITY OF NIAGARA FALLS, NEW YORK, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, DIRECTOR OF THE OFFICE OF REVENUE SHARING, CITY MANAGER(Chief Executive, City of Niagara Falls, N.Y.), MEMBERS OF THE CITY COUNCIL OF THE CITY OF NIAGARA FALLS, N.Y., HON. HUGH CAREY, Governor of the State of New York, HON. JOHN J. LaFALCE, Member of Congress,

Defendants-Appellees.

79-6089

Appeal from a decision of the United States District Court for the Western District of New York, dismissing the complaint as to all defendants.

We affirm on the opinion below of the Hon. John T. Curtin, Civ. 78-656 (W.D.N.Y. March 20, 1979). Moreover, we note that, as to that portion of the complaint alleging violations of 42 U.S.C. § 2000e et seq., plaintiff has failed to exhaust his administrative remedies with the Equal Employment Opportunity Commission or with the New York State Division of Human Rights. 42 U.S.C. § 2000e-5(c). The district court was therefore without jurisdiction to review his grievance under that statute.

William H. Mulligan

Ellsworth A. Van Graafeiland

Thomas J. Meskill

APPENDIX C
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPH PROFIT

Plaintiff-Appellant

-vs-

CITY OF NIAGARA FALLS, NEW YORK
SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA
DIRECTOR OF THE OFFICE OF REVENUE SHARING
CITY MANAGER (Chief Executive, City of Niagara Falls, New York)
MEMBERS OF THE CITY COUNCIL OF THE CITY OF NIAGARA FALLS, NEW YORK
HON. HUGH CAREY, GOVERNOR OF THE STATE OF NEW YORK
HON. JOHN J. LA FALCE, MEMBER OF CONGRESS

CIVIL ACTION
No. 79-6089

Defendants-Appellees

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that JOSEPH PROFIT, the plaintiff abovenamed, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on October 1, 1979.

This appeal is taken pursuant to 28 U.S.C. 1252 and 28 U.S.C. 2101 (c), the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. Sections 1221-63 (as amended in 1976) ("Act"); under 42 U.S.C. Sections 1981, 1983, 1985; under the due process clause of the Fourteenth Amendment to the U.S. Constitution; and 42 U.S.C. Sections 2000d-1, 2000d-2, 2000d-3, 2000d-4, 2000d-5, 2000d-6 and Title VII of the Civil Rights Act, and 31 U.S.C. Section 1244.

OFFICE OF THE SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20226

D-1

APPENDIX D

#2

CERTIFIED - RETURN RECEIPT REQUESTED

NOV 30 1977

Dear Mr. O'Hara:

By letter dated April 6, 1976, the Office of Revenue Sharing notified the City of Niagara Falls, New York, that complaints had been received alleging that the City was in violation of Section 122(a) of the State and Local Fiscal Assistance Act of 1972. Specifically, the complainants alleged that the City and the Municipal Civil Service Commission discriminate against minorities and females in hiring, promotion and job assignments in the Public Safety and Public Works Departments.

On August 2 and 3, 1977, representatives of the Office of Revenue Sharing conducted an investigation into the allegations contained in the complaint.

I. Public Works Department

1. The Complainant, Mr. Joseph Profit, alleged that he was removed from the position of Director of Public Works because of his race, black. The City Manager and Director of Personnel asserted that new job specifications for the Director of Public Works position contained qualifications, a state engineering license, the Complainant did not meet. The investigation disclosed that the Complainant had functioned as the Director of Public Works from September 1, 1970 until August 16, 1974 when he resigned. The resignation was prompted by the City's offer of a demotion to Deputy Director because the Complainant lacked the necessary new job specifications. The engineering license requirement resulted from recommendations made by a Public Administration Service position description and salary review of the City conducted during 1974. The official adoption of the revised specifications for Complainant's position and 10 others by the City Civil Service Commission did not take place until June 1975, although there is some question as to

the legitimacy of the Commissions adoption of all of these recommendations.

The investigation disclosed no evidence that any other position incumbent was similarly displaced as a result of the recommendations as was the complainant, the only black department head.

The evidence further shows that the previous Director of Public Works and the present Director, both white, do not have an engineering license. The white male replacing the complainant and holding the position for approximately 15 months did possess an engineering license.

The evidence fails to support the City's contention that an engineering license was a necessary requirement for the position. Considering all of the evidence cited above and the fact that this requirement was used to displace the complainant from his position and has not been applied similarly to the white male presently occupying the position, I find that the complainant was discriminatorily removed from the Director's position, as alleged, in violation of Section 122(a) of the State and Local Fiscal Assistance Act of 1972.

II. Total City Employment

The complaints allege that the City of Niagara Falls, New York discriminates against minorities and females in its hiring practices and job assignments. The investigation disclosed the following:

1. While minorities comprise 7.6% of the available labor market, they represent 62 or 6.3% of the jurisdiction's workforce, which is approximately 989 full-time employees. Of the 55 black employees, 44 or 80% are situated in hourly paid positions (service, laborers). There are also three black firefighters, three police officers and five in other salaried positions which reflects a 1.7% black representation in the City's salaried positions. As females comprise 38.3% of the available

labor market, they only represent 16% or 17.6% of the jurisdiction's workforce. The evidence indicates that females occupy a disproportionate percentage of lower-paying clerical type positions.

3. The City's Fire Department workforce shows a total of 177 employees of whom three (3) or 1.6% are black. Evidence revealed that the last black employee was hired 14 years ago. At least 75 white males have been hired since 1963. There are no females within the City Fire Department. As it relates to promotion, among the three black firefighters, only one black firefighter has been promoted in his 23 years service with the fire department.

4. The City's police department employs approximately 202 employees of whom three (3) or 1.4% are black male officers while 13 or 6% are female employees. Nine of the females are in clerical positions, three are auxiliary policewomen, one is a police matron, and one is employed as a legal advisor. The Revenue Sharing Act and Regulations require that an employer judge females on their individual capacities to perform a particular job rather than preconceived opinions concerning the capacities of females as a class, except where sex is a bona fide occupational qualification reasonably necessary for the normal operation of the job. The jurisdiction's officials offered no evidence that all or substantially all females are unable to perform the duties of both police officer and firefighter.

5. The general application for all city positions seeks the following non job related information which could be used to discriminate on the basis of race, sex, national origin, or handicap status:

   a. height and weight

   b. marital status

   c. number of dependents

d. handicapped inquiry and

e. arrest inquiry

6. The City Manager and Director of Personnel indicated that recruiting is done primarily by word-of-mouth. Since the jurisdiction's workforce is predominantly white male, the reasonable foreseeable effect of the jurisdiction's word-of-mouth recruiting is that the majority of its referrals will tend to be white male.

7. The City of Niagara Falls, New York adopted an Affirmative Action Plan effective September 6, 1977. All statements in the Plan defining the covered bases of discrimination should include handicapped status. The goals and timetables section of the Plan projects vacancies and goals only in terms of broad EEO-4 job categories. There are no projections for specific positions within the various City departments. According to the 1978 projections, the Plan notes that all new hires will be either females or minorities.

Based upon the virtual restriction of black employees to service/laborer positions and females to office/clerical positions and the lack of blacks and females in the City's Police and Fire Departments as police officers and firefighters respectively, I find that the City of Niagara Falls, New York is in violation of Section 122(a) of the State and Local Fiscal Assistance Act of 1972 and Sections 51.52 - 51.54 of the Regulations.

III. Fire Protection

During the course of the investigation, an additional complaint was raised regarding the lack of adequate fire protection for the black community which evidenced an additional area of noncompliance. Evidence revealed that Engine Company #6 which serves the majority of the City's black community is periodically closed and understaffed. In addition, the bridge which leads in and out of the black community had been closed and deemed unsafe.

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e. arrest inquiry

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to vehicular traffic (including fire trucks) since May 1977, and was reopened to vehicular traffic only on August 2, 1977. Thus, with Engine Company #6 understaffed or closed, and the bridge previously unopened to vehicular traffic, a matter of two to five minutes could be lost by another Engine Company taking an alternate route which could result in unjustified losses in the black community.

As a result of the findings of noncompliance cited above, I am sending this letter as required by Section 122(b) of the Act and Section 51.59 of the Regulations. A copy of this letter is also being sent to Governor Hugh L. Carey.

It is therefore requested that the City of Niagara Falls, New York:

1. Rehire the Complainant, Joseph Profit, into a position comparable to the job of Director of Public Works and at the rate of pay he would be receiving had he not been removed from the Director's position. Restore the seniority lost between the time of the termination and reinstatement. Provide for the reinstatement of the Complainant to Director of Public Works when the position becomes vacant. Provide full back-pay to the Complainant to include any salary increases he would have received since August 16, 1974 to the present plus 6% annual interest on the base salary. The back-pay award should subtract, upon proof provided by the Complainant, all earnings he received during the time since August 16, 1974.

   Agree to make those contributions that would normally have been made to the Complainant's insurance and pension plans and restore to the Complainant any other fringe benefits which would have accrued had the Complainant not terminated the position.

   Provide to the Office of Revenue Sharing documentation showing how the back-pay award was computed. Also provide a description of the position into which the Complainant will be rehired and the date of rehire.

Review, with the Complainant, his employment record to ensure that there are no notations or comments to the effect that his previous performance as Director of Public Works was anything less than satisfactory.

2. Expand the goals and timetables section of the Affirmative Action Plan, for the Office of Revenue Sharing approval, establishing goals and projections by position title and department. The goals should reflect the minority and female representation in the available labor market for Niagara Falls. Particular attention should be given to those uniformed positions within the Police and Fire Department.

3. The City should establish an Affirmative Action file for applications of members of minority groups and females. This file shall consist of applications of all minorities and females who are qualified for specific positions with the City government and those applicants whose qualifications have not yet been established. As job vacancies occur, the City will consult the Affirmative Action file to determine the availability of a minority or female applicant.

4. Devise new titles (which are not sex restrictive) for City positions, for example, auxiliary police officer.

5. Discontinue the use of those personnel tests for decision making for either pre-employment or subsequent placement purposes which have not been professionally validated under EEOC's Guidelines on Employment Selection Procedures.

6. Discontinue the use of any selection and/or screening devices which have a potential disparate impact upon blacks and females, unless such devises can be shown to be job related.

7. Review and revise all employment application forms used by the City, as necessary to eliminate all potentially discriminatory inquiries which tend to have a disparate impact on minorities and females, unless such inquiries can be shown to be job related.

8. The City should immediately devise and implement a plan to ensure that Engine Fire House #6 is adequately staffed to maintain fire protection to the community that is benefited by Engine Fire House #6.

9. Submit semi-annual reports to the Office of Revenue Sharing containing documentation to verify the implementation of items 1 - 8, and a current roster of employees indicating the name, race, sex, date of hire, present position, and present salary. The first report will be due January 1, 1978 and every six months thereafter.

Pursuant to Section 51.59(a) of the Revenue Sharing Regulations, this is to request that you respond within sixty (60) days of your receipt of this letter. Please indicate your intentions and efforts to correct the violations cited, and implement the actions enumerated above.

You will note that pursuant to Subpart G of the Regulations, this Office may initiate an administrative proceeding for failure to comply.

In all cases, however, our goal is voluntary compliance, and we are available to provide assistance to you as needed. If you have any questions regarding this matter, please contact Ms. Sue Jackson, Supervisor, Civil Rights Division at (202) 634-5240. She will be happy to furnish you or your staff with any assistance or additional information.

Sincerely,

/s/ Bernadine Denning

Bernadine Denning
Director
Office of Revenue Sharing

Mr. Donald O'Hara
City Manager
City Hall
Niagara Falls, New York 14302

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

JOSEPH PROFIT,

Plaintiff,

-v-

CIVIL DOCKET
NO. 1978-656

CITY OF NIAGARA FALLS, New York,
et al,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, on February 15, 1979.

APPEARANCES:

ARTHUR SAYRES ANDERSON, SR., Esq.,
Attorney for the plaintiff.

RICHARD J. ARCARA, United States Attorney,
Attorney for the UNITED STATES defendants;
MS. ROSEMARY ROBERTS, Assistant United
States Attorney, of Counsel.

ROBERT ABRAMS, Attorney General of the
State of New York, Attorney for STATE OF
NEW YORK defendants; JAMES KENNEDY,
Assistant Attorney General, of Counsel.

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THE COURT: 1978-656, Profit. Mr. Anderson, can you tell me briefly what your motion is?

MR. ANDERSON: Yes, your Honor. It is a motion to find the City of Niagara Falls and the United States Government and the State of New York, specifically through the counsel here, to find them in default insofar as their answers are concerned for the motion made by the plaintiff for a summary judgment. I mean for a summary judgment in this case.

THE COURT: Why do you say they are in default?

MR. ANDERSON: Because as I point out in my statement, your Honor, I was entitled to default being that, - I only wish Mr. Sax was here.

THE COURT: Mr. Anderson, I can not understand you.

MR. ANDERSON: Okay, yes, sir.

THE COURT: Why do you say they are in default?

MR. ANDERSON: Okay. In the first instance, as far as Niagara Falls is concerned, - can the Court hear me now? That the law is so far as the, - as Niagara Falls is concerned, states that where the plaintiff serves the, - serves an affidavit with his motion for a summary judgment that the defendant must, and this is my, - this is under Section 2717 of the Federal Practice and

Procedure, Page 445, which says where the claimant as a practical matter filing an affidavit or supporting affidavits along with his motion for summary judgment, quote, whenever he does file affidavits Rule 56(e) requires that the opposing party must do likewise or summary judgment if appropriate will enter. In this case Mr. Sax did not reply with an affidavit. He sent a three paragraph note to the Court in which he outlined - - -

THE COURT: Didn't we argue this before, Mr. Anderson?

MR. ANDERSON: No, we didn't, your Honor. We did not argue the default. The law says - - -

THE COURT: Do you mean to say that simply because there was only a letter here in this business?

MR. ANDERSON: Yes, sir. The law is very specific on that, your Honor.

THE COURT: The other thing is, Mr. Anderson - - -

MR. ANDERSON: Yes.

THE COURT: 2719 of the Federal Practice and Procedure, what are you talking about?

MR. ANDERSON: No, no, 2717, your Honor.

THE COURT: Let me see the book you are looking at.

MR. ANDERSON: Yes, your Honor.

THE COURT: I see. Federal Practice and Procedure,

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Wright and Miller. I thought you were referring to some rule. I never heard of that rule before. Well, look, Mr. Anderson - - -

MR. ANDERSON: Yes.

THE COURT: The Court has discretion in these matters and as it is, as I understand it as far as the others are concerned, Mr. Kennedy and Miss Roberts, they were late in filing their affidavits.

MR. ANDERSON: Yes, they were, your Honor, and the law is right.

THE COURT: You and I have never been late?

MR. ANDERSON: Your Honor, they are the ones that requested that we delay. The law is very specific.

THE COURT: In discretion I deny your motion and, Miss Roberts, will you prepare an order, please - - -

MISS ROBERTS: Yes, your Honor.

THE COURT: Making that part of the record.

MISS ROBERTS: Yes, your Honor.

THE COURT: We are going to take this on the merits, Mr. Anderson, not on some technicality. You know as a practical matter, - you have been around the courts for years and years and you certainly are aware that as far as deciding matters of this nature there has been no

persistent default at all upon the part of any of the parties here. They have attended here every time. Mr. Sax is away. When he was here the last time he said he was going to be away and I told him that he did not have to be here.

MR. ANDERSON: Your Honor, may I - - -

THE COURT: Mr. Anderson, that is the end of the proceeding today. Your motion for default is denied, period. We are going to take care of this on the merits.

MR. ANDERSON: Well, may I take exception to your Honor's ruling?

THE COURT: Certainly. You are entitled to.

* * * * * *

I certify that the foregoing is a correct and complete transcription of my shorthand notes taken herein.

E.F. KNISLEY, Official Reporter, USDC,WDNY.